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ABSTRACT

Following the desegregationists' victory in "Brown v. Board of Education" in 1954, there came a succession of gains for desegregation, until a new phenomenon developed in "Bakke v. Regents of University of California" in 1973. Since Bakke's grades and test scores were higher than those of some minority applicants admitted to the University's medical school under a quota system, he believed that he was better qualified to become a physician and claimed that he had been a victim of "reverse discrimination." Bakke won his case, and in its opinion the Court outlawed quotas and declared affirmative action programs to be permissible only on a voluntary basis. Reverse discrimination, however, is a necessary form of compensatory justice for minorities, for the following reasons: (1) one must assume responsibility for the problems of one's society, regardless of which generation caused them; (2) affirmative action programs do not stifle initiative and enterprise as some opponents claim--the very act of applying for educational or employment opportunities in this competitive society is evidence of both; (3) doing nothing ensures continued segregation; (4) desegregation cannot be implemented without taking race into account; (5) no correlation has been demonstrated between test scores and performance in the professions; and (6) minority students consistently score lower on standardized tests. Unless affirmative action is mandated, theoretical equality will never become real equality. (CMG)

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RACISM IN THE SCHOOLS

Desegregation - From Brown to Bakke

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by

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September 1983

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RACISM IN THE SCHOOLS

Desegregation - From Brown to Bakke

One of the most memorable decisions made by the United States Supreme Court was made in the famous Brown vs. the Board of Education court case in Topeka, Kansas (1954). The court ruled that segregation of schools had detrimental consequences for black children and therefore violated the equal protection guaranteed in the Fourteenth Amendment. This case reversed the 1896 Supreme Court ruling of Plessy vs. Ferguson in which separation of the races was constitutional as long as the facilities that were available to each were equal.[1]

The purpose of this paper is to give a general overview of attempts made by the United States legal system to desegregate its schools. The unraveling of the separate but equal doctrine might be said to have its real beginnings in the case of Brown vs. the Board of Education in 1954. After this came a succession of victories towards desegregation of schools and of society until a new phenonemon developed in the court case of Bakke vs. the University of California Medical School in 1973. This phenonemon was labeled "reverse discrimination". In a discussion of the Bakke case I hope to defend my position supporting the phenonemon of "reverse discrimination" as a necessary form of compensatory justice for minorities.

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[1]Milton D. Morris, The Politics of Black America, New York, Harper & Row Publishers, 1975, p. 215.

The Brown vs. the Board of Education court case sparked a massive national movement. Having received abysmally little attention from 1876 to 1954 the blacks suddenly found themselves and their problems in the spotlight. Newspapers, magazines, television, radio and books all conspired to bring the focus of attention to black issues.[2] The ruling in this court case was followed by "orders" from the court one year later (in Brown II) that public schools discontinue segregation of black and white students with "all deliberate speed."[3] Due to the vagueness of the term "all deliberate speed," the 1954 Brown decision was still uninforced in most of the affected school districts more than a decade later. The courts had outwardly failed to order an end to segregated schooling. Instead, it placed enforcement responsibility in the hands of school officials and local federal district courts.[4]

This dismanteling of the separate but equal doctrine had not happened suddenly with Brown in 1954 but had begun with a long line of victories in the courts dating back to the 1940's. It is not insignificant that the Brown case and other civil rights cases were the result of a well-prepared legal assault on segregation prepared by black attorneys

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[2]Reo M. Christenson, Challenge and Decision, 3rd ed. New York, Harper & Row Publishers, Inc., 1970), p. 60.

[3]Morris, p. 215.

[4]Ibid., p. 249.

under the direction of black legal expert Charles Houston in the 1930's.[5] The Brown case was prepared by the National Association for the Advancement of Colored People (NAACP) and argued before the first black Supreme Court Justice, Thurgood Marshall.[6] I think this fact speaks for itself.

Congress enacted progressive civil rights legislation during the Lyndon Johnson administration. The Title IV of the Civil Rights Act of 1964 forbade discrimination on the grounds of race, color or national origin.[7] This act empowered the Attorney General to take legal steps toward the "prompt desegregation of schools and public facilties". This legislation forbade discrimination in jobs, educational institutions and public places. The Civil Rights Act also authorized the suspension of federal funds when states used them in a discriminatory manner.[8]

This push for equality in the 1960's evolved into the concept of real equality rather than just theoretical equality.[9] The courts took a firmer position on the question of school desegregation in the case of Alexander vs Holmes in 1969. It was then that the courts held that a standard

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[5]Joel Dreyfuss and Charles Lawrence III, The Bakke Case: The Politics of Inequality; New York, Harcourt Brace Jovanovich, 1979; p 49.

[6]Morris, p. 215.

[7]Dreyfuss and Lawrence III, p.189.

[8]Christenson, p. 61.

[9]Dreyfuss and Lawrence III, p. 7.

of "all deliberate speed" for desegregation was no longer permissible. This ruling came after substantial progress had already been achieved through the Civil Rights Act of 1964.[10]

In spite of the Civil Rights Act, civil rights leaders argued that the right to vote, equal access to restaurants, motels and places of amusement and equal employment and education legislation did little for the average black in the slums. Milton D, Morris reminds us of the discrepancy between theoretical and real equality in the following statement:

> "The millions of Negro poor, largely cooped up in the inner city ghettoes, found their lives about as cheerless as before They continued to work (if at all) at low paying jobs, to send their children to inferior schools, to live in squalid and cramped housing and to receive inferior public services." [11]

Although the Supreme Court continuously demonstrated attempts to give blacks and other minorities equal opportunities, segregation still existed in the United States as a result of residential patterns rather than from policy decisions. In the Swann vs Charlotte Mecklenberg case in 1971, it was ruled that school authorities were required to do whatever necessary, including busing, to end segregation in the schools.[12]

As the end of the 1970's was approaching, Americans became painfully aware that social problems could not be

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[10] Morris, p 249
[11] Christenson, p 68.
[12] Morris, p 250

solved without courts to one group or another.[13] Many believed that when members of minorities were given an advantage through preferential programs that they would be able to compensate for their disadvantages which had been caused by our history of racism. This concept of "affirmative action" led many firms and agencies eager to avoid charges of employment discrimination and possible boycott, to give qualified blacks preference over equally qualified white applicants.[14]

This thinking set the stage for the well known court dispute between Allan Bakke and the regents of the University of California Medical School. This case involved attempts by the University to correct the injustices of the segregated past by setting aside 16 out of 100 places in each class for students from economically disadvantaged backgrounds. Since Bakke's grades and test scores were higher than those of some minority applicants, Bakke believed that he was better qualified to become a physician and claimed that he had lost his rights to this new injustice of "reverse discrimination."[15]

The case of Bakke vs. the Regents of the University of California resulted in great controversy in American thinking. Some believed that compensation for blacks was in itself a form of racism. Others believed that compensatory

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[13]Dreyfuss and Lawrence III, p. 9.

[14]Christenson, p. 62.

[15]Dreyfuss and Lawrence III, p. 7.

effort must be made to help the minorities overcome generations of inequal opportunity in education and American society. I would like to spend the remainder of this paper explaining my position in defense of "reverse discrimination" using the Bakke case to illustrate typical controversies that occur in this sort of argument. One example of the type of argument an anti-affirmative action advocate would give is stated in the words of Kyle Haseldon, Managing Editor of the Christian Century:

> "Compensation for Negroes is a subtle but pernicious form of racism. It requires that men be dealt with by society on the basis of race and color rather than on the basis of their humanity. Racism, whoever may be its temporary beneficiary, should be eliminated from the social order, not confirmed by it. Preferential economic status for Negroes would penalize the living in a futile attempt to collect a debt owed by the dead. The 20th century white man is no more to blame for the fact that his ancestors bought and held slaves than are 20th century Negroes for the fact that some of their ancestors captured and sold slaves... Preferred status for the Negro, however much society may owe him a debt, will inevitably destroy in him the initiative and enterprise required of a minority people in a highly competitive society. Slavery corrupts ambition and self-reliance; so too, does patronizing social status. 16

Although this argument has a certain amount of truth, it seems to me that history has demonstrated that doing nothing does not make a problem go away or solve itself. Haseldon offered no better solution as critics often neglect to do. Although our generation may not be to blame, one must assume a responsibility for the problems of the society in which he lives in and often this means patching up the

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16 Kyle Haseldon, "Should There be Compensation for the Negro?" The New York Times Magazine, October 6, 1963, p.128.

messes our ancestors got us into. As for "patronizing social status" destroying initiative, one needs only to remember that only those applying for employment or educational opportunities would be affected by affirmative action procedures. The very act of applying shows initiative and enterprise required in our highly competitive society. Although affirmative action and other instances o "reverse discrimination" seem unjust to some, doing nothing seems a sure way to ensure that segregation continues. None of the progress made by minorities was made by whites "doing nothing". The reality of the situation is that whites are all for equal opportunity of education and employment for minorities unless of course, it involves making sacrifices on their part. The fact that many Americans support desegregation laws as well as fair employment and equal access laws is less significant than their unwillingness to make financial or other sacrifices to help bring blacks closer to educational and economic equality. As was appropriately stated by Joel Dreyfuss:

> "It takes courage to admit that wealth and political power still bring advantages in our democracy. It is even more difficult to realize that we all cannot have what we want or deserve because that undermines the greatest American dream of all.17

As to the accusation that compensation for minorities is in itself a form of racism, the logical question that comes to my mind is how else could attempts to desegregate education admissions and hiring plans be implemented without paying attention to race?

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[17]Dreyfuss & Lawrence III, p. 10.

The essence of the Bakke case is best stated by Bakke himself in the following statement:

> "I am convinced that a significant fraction of every current medical class is judged by a separate criterion, I am referring to quotas, open or covert, for racial minorities. Medicine needs the ablest and most dedicated men in order to meet future health care needs. I realize that the rationale for these quotas is that they attempt to atone for past racial discrimination but instituting a new racial bias, in favor of minorities, is not a just solution."[18]

The defense of Allan Bakke was based on his test scores. Bakke believed that he was better qualified for Medical school on the basis of his grades and Medical College Admissions Test (MCAT) which is required by every medical school in the country. His scores were higher than those of the average student admitted.[19]

The validity of this point depends upon how much credence one gives to test scores. Neil Postman stated that technical people are apt to be "preoccupied with scores, not competence", in his warnings to keep standardized test scores in perspective.[20] Postman stresses unmeasurable qualities such as our sense of character and conduct, creativity, justice and sympathy, self-knowledge, self-control, precision of action, considerateness and motivation. Davis Medical School contended that the process in which they selected applicants tried to judge more than just academic qualities.[21]

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[18] Dreyfuss and Lawrence III, p. 14.

[19] Ibid., p. 16.

[20] Neil Postman, Teaching as a Conserving Activity; New York, Dell Publishing Co., Inc., 1979; p. 149, 153.

[21] Dreyfuss and Lawrence III, p. 46.

The National Research Council concluded recently that there has been little effort to demonstrate a correlation between test scores and performance in the profession to which applicants wish to enter. They stated:

> "Admissions tests cannot be said to predict which applicants will be a good doctor or a good lawyer This means that tests should not be allowed to completely determine the admissions process, since some people who do somewhat less well in the academic program may be outstanding in the profession. 22

Equal Opportunity programs often claim to give positions to the most qualified applicant regardless of race. This seems fair unless one takes into account the fact that minority students consistently score lower on standardized tests - which are often used to determine whether or not an applicant is "qualified". The U.S Department of Health, Education and Welfare verified this in their extensive studies in Equality of Educational Opportunity (or the Coleman Report):

> "With some exceptions - notably oriental Americans, the average minority pupil scores distinctly lower on tests at every level than the average white pupil... The deficiency in achievement is progressively greater for the minority pupils at progressively higher grade levels." 23

In my opinion these facts give further evidence of the need to give minorities compensatory opportunities to overcome these deficiencies. The studies in Equality of Educational Opportunity have shown that schools provide no opportunity

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[22]National Research Council, "Text of Panel's Conclusions and Recommendations on Testing", The Chronicle of Higher Education, vol. XXIII, Feb. 10, 1982, p. 9.

[23]U.S Department of Health, Education and Welfare; Equality of Educational Opportunity; Washington, U S. Government Printing Office, 1966, p. 21.

at all for minority groups to overcome this initial deficiency:

> "For most minority groups, then, and most particularly the Negro, they fall farther behind the white majority in the development of several skills which are critical to making a living and participating fully in modern society. Whatever may be the combination of non-school factors - poverty, community attitudes, low educational levels of parents - which put minority children at a disadvantage in verbal and non-verbal skills when they enter the first grade, the fact is that schools have not overcome it." 24

In the Bakke case, the special admissions committee consisted mostly of mirority faculty and student members. This committee had been set up to bring greater diversity into the medical school and sought persons from economic and disadvantaged backgrounds. A quota of 16% does not seem unfair in that there was still an 84% chance for advantaged whites. I have still less sympathy for Bakke since he was already an engineer at NASA's Ames Research Center and was hardly a member of the disadvantaged class. From what I can interpret from the case, there was never any real evidence that Bakke would have been considered anyway. He had applied to at least 13 other medical schools and was rejected by all. This could have been due to sheer numbers. There were, after all, 2,464 applicants competing for 100 positions. Officials admit that the majority of rejected applicants are qualified to study medicine.[25] In spite of this, the courts admitted him to medical school. Bakke won his case because the university

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[24] U. S. Department of Health, Education & Welfare, p. 21.

[25] Dreyfuss and Lawrence III, p. 16.

was unable to prove that he would not have been admitted if the special admissions program had not existed.[26]

Although the Bakke case was essentially a case of equality of educational opportunities, it became also a case of equality of economic opportunities because of the implications for employment discrimination cases. This was a very sensitive issue in which the courts were faced with a series of battles similar to Bakke's over the use of race-conscious quotas in affirmative action programs.

Executive order 11246 gave the Labor Department the power to require every federal contractor to have an affirmative action program.[27] Between 1971 and 1975 federal courts issued and sustained quota orders. After federal judges began requiring that employers do something about desegregating their work force, many employers entered into voluntary affirmative action programs. Some did this out of a sense of social responsibility and others in concern about the costs of defending their actions in court.[28]

Aside from Bakke's victory in being admitted into medical school, it was also concluded that the use of quotas was unlawful under the Title VI of the Civil Rights Act of 1964. At the same time, however, the race conscious affirmative action programs were declared constitutional.[29]

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[26] Ibid., p. 208.
[27] Ibid., p. 250.
[28] Ibid., p. 249.
[29] Ibid., p. 208.

Affirmative Action programs were declared permissible yet were not mandantory. A model of the Harvard College admissions program was suggested as an example of an acceptable affirmative action program without quotas:

> "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicants' file, yet it does not insulate the individual from comparison with all other candidates for available seats."[30]

Although the result of the Bakke case was not a total loss for affirmative action advocates, it was a setback. Voluntary affirmative actions might work but I believe mandantory programs work faster. I see the murkiness of the Bakke decision as just another case of the courts support of "theoretical" equality while shying away from programs designed to hasten "real" equality of the races.

After living in southern Africa where the law strictly enforces and upholds racism, I will concede that the United States has made enormous and admirable progress in its attempts to promote equal opportunity for minoritites. In spite of these attempts, the fact remains that for the past 25 years, black unemployment has stayed double the white rate no matter what the economic situation. Medical schools are more than 90% white and 95% of law students are white. Minorities come nowhere near having representation approaching their numbers in virtually every desireable job category.[31]

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[30] Ibid., p. 212.
[31] Ibid., p. 213.

In their discussion of the progress of minority legislation in America, Dreyfuss and Lawrence III stated:

> "After two decades of civil rights activism and ten years of feminism, being born white and male continues to be the best guarantee of success in America." 32

These types of facts lead me to further believe that progress in the granting of equal opportunities for minorities is not being made as fast as the courts might lead us to believe. I support the view that compensatory efforts like affirmative action programs must be mandated to ensure that equal opportunity becomes a <u>real</u> rather than just a <u>theoretical</u> phenonema.

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[32] <u>Ibid</u>., p. 213.

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